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*Publication date:*  
2019

*Document version*  
Publisher's PDF, also known as Version of record

*Citation for published version (APA):*  
Drugda, S. (2019, Jul 2). Can the President of the Slovak Constitutional Court Defend It? Blog of the International Journal of Constitutional Law.

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 [iconnectblog.com/2019/07/can-the-president-of-the-slovak-constitutional-court-defend-it/](https://iconnectblog.com/2019/07/can-the-president-of-the-slovak-constitutional-court-defend-it/)

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—Simon Drugda, PhD Candidate at the University of Copenhagen

For the fourth time since February, the Slovak Parliament failed to select candidates to replace constitutional judges whose term of office has expired. Only seven judges remain to run the most powerful court in the country. What is more, as the Parliament enters summer recess, the next round of hearings will not begin until mid-September.

The new President of the Constitutional Court (PCC), Ivan Fiačan, has kept a low profile during the controversy. When the Parliament resumes its business, however, the PCC should be prepared to defend his Court. Two senates of the Court are now defunct because there are not enough judges to staff them. The Court has been overrun with unassigned cases and a terrible backlog.

The PCC has two potent statutory and one informal power that allow him to put pressure on the Parliament and contribute to the selection process: 1) the power to nominate candidates for constitutional judges; 2) to attend parliamentary sessions; and 3) the exclusive power to speak for the Court. In this contribution, I examine these three powers that have great defensive potential.

## **Nomination Power**

The selection and appointment process for constitutional judges proceeds in three steps. At the entry-level, nominators present individual candidates for consideration to the parliamentary Constitutional Committee. The Committee then holds live hearings to interview the candidates. At the intermediate level, the debate and selection vote in the Parliament take place. Finally, there is the output level of the presidential appointment, which concludes the process.

The nomination power is generally limited to heads of several prominent state bodies, MPs, and law faculties, all of which should have an interest in meritorious appointments to the Constitutional Court. The PCC also has the power to make nominations to the Constitutional Committee and the character of that power changes in the hands of the Court President based on the time that remains to the end of her term. In the hands of a retiring PCC, the nomination power turns into a tool to select successors. Such a PCC can thus influence the jurisprudence of the Court beyond her own term of office. To a newly appointed PCC, on the other hand, this power gives the opportunity to hand-pick colleagues with whom to work.

Let us next examine the historical record to see whether PCCs have used the nomination power effectively. In Slovakia, we refer to four “generations” of constitutional judges that correspond in time to the leadership of the four presidents of the Court since its establishment in 1993. I limit my analysis to the first two PCCs who contributed to the appointment of the second and third-generation Constitutional Court. The first PCC Milan Čič used the nomination power only four times but to a great effect. Two of his nominees were successfully appointed to the Court (one as its new President). The second PCC Ján Mazák exercised the nomination power even more frequently. Mazák, and on one occasion his Vice-President, made ten nominations to the Parliament. Five of the ten were successfully appointed to the Court.[1]

The aggregate data for appointments in the observed period 1997-2006 further shows that PCC nominations have a nominally higher success rate at both mid- and output level of the selection process. The following probabilities are not adjusted for each selection and can thus only serve as crude estimates but the average rate of success for a nominee to become a constitutional judge is 17 percent (133 nominees for 23 positions). In comparison, PCC nominations as a subgroup have on average 50 percent success rate (7 judges appointed out of 14 nominees). The nomination power thus can and in the past did influence the selection process.

### **Power to Attend Parliamentary Sessions**

The PCC can also exert indirect influence in the intermediate stage of the selection vote in the Parliament by attending that specific parliamentary session. According to Article 20(1) of the parliamentary Rules of Procedure, the PCC may attend a session of the Parliament she chooses and “cannot be excluded” from attendance by the Chairman of the Parliament. Admittedly this power has only limited effect. The attendance of a parliamentary session does not give the PCC a direct means to force the Parliament to act without undue delay in selecting constitutional judges. However, because the attendance power has never been used before, it would likely attract high media attention and change the incentive structure for the Parliament. It would arguably cause reputational damage to the Parliament if it ignored its constitutional obligations to the face of the PCC.

### **Power to Speak for the Court**

Finally, there is one informal power that the PCC has, but is not based on a statutory rule. The plenary session of the Constitutional Court has adopted an internal practice order, whereby the PCC has the exclusive authority to represent and speak for the Court in public.[2] No other judge is allowed to give interviews, comment on cases or judicial matters. The only exception from this blanket prohibition on extrajudicial speech is the academic and artistic activity of judges. The PCC is thus the single voice that can defend the Court against attacks from the political branches, and equally the only one to criticize the politicians if they fail to fulfill their constitutional obligation to the detriment of the Court.

## Conclusion

The powers of the PCC to nominate candidates for constitutional judges, attend parliamentary sessions, and speak for the Court have great defensive potential, but they can also be abused. They overlap with powers of the Parliament in certain respects, and as such should only be used sparsely at times when the Parliament does not fulfill its constitutionally prescribed obligations. I propose that the longer the delay in appointments, the stronger should be the presumption in favor of the PCC to intervene one way or another. The three examined powers make the PCC uniquely equipped to alleviate, if not solve, the problem with appointments of constitutional judges.

**Suggested Citation:** Simon Drugda, *Can the President of the Slovak Constitutional Court Defend It?*, Int'l J. Const. L. Blog, July 2, 2019, at: <http://www.iconnectblog.com/2019/06/can-the-president-of-the-slovak-constitutional-court-defend-it?>

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[1] The practice of the third PCC Ivetta Macejková marks a point of departure. Despite ample opportunities, Macejková used the nomination power only once.

[2] Second sentence of the Appendix No. 1 to the Principles of Media Information on the Decision-Making Activities of the Constitutional Court of the Slovak Republic states: "For the Constitutional Court, only the President of the Constitutional Court, the Vice-President and the spokesman of the Constitutional Court shall provide information to third parties (including print and electronic media)."